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In the Supreme Court of the United States

OCTOBER TERM, 1976

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 540 F. 2d 71. The regulations of the Interstate Commerce Commission (Pet. App. 26a-36a) are codified as 49 C.F.R. Part 1126. The order promulgating the regulations and the supporting report (Pet. App. 37a-93a) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a-98a) was entered on June 9, 1976. A timely petition for rehearing was denied on July 8, 1976 (Pet. App. 99a-100a). The petition for a writ of certiorari was filed on October 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations of the Interstate Commerce Commission, which provide that a rail carrier directed to provide service over the lines of a defaulting carrier will ordinarily not be reimbursed for rental payments for use of the defaulting carrier's property, sanction a taking of the defaulting carrier's private property for public use without just compensation in violation of the Fifth Amendment.

STATEMENT

1. Section 1(16)(b) of the Interstate Commerce Act, 49 U.S.C. (Supp. V) 1(16)(b),[1] gives the Commission emergency authority, in certain specified circumstances, to direct a rail carrier temporarily to provide for the handling, routing, and movement of traffic over the lines of another carrier when the other carrier is unwilling or unable to transport the traffic offered to it in default of that carrier's public service obligations. Section 1(16)(b)(E) permits the directed carrier to recover from the government a sum equal to the amount by which the cost of its directed operations exceeds the revenues derived from those operations.

Subsection (E) defines cost as "those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit." That subsection also directs the Commission to prescribe a form on which a directed carrier may record its reimbursable costs; the

[1]Section 1(16)(b) was added to the Act by Section 601(e) of the Regional Rail Reorganization Act of 1973, 87 Stat. 1021. Its full text is set forth at Pet. App. 101a-103a.

Commission is responsible for certifying to the Secretary of the Treasury the amount of reimbursement to be paid under the Act to any directed carrier.

In March 1975, the Commission promulgated regulations (Pet. App. 26a-36a) prescribing a general cost form and procedures for the submission of information to justify reimbursement under Section 1(16)(b). The Commission's accompanying report (Pet. App. 37a-93a) addressed the question whether rental payments made by a directed carrier to a carrier unwilling or unable to transport traffic for the use of that carrier's lines and facilities are reimbursable costs within the meaning of the Act.

The Commission determined that, "in the usual situation, where costs exceed revenues, no compensation or rent for the use of the defaulting carrier's lines and facilities is required," because "there is no economic loss to the defaulting carrier resulting from the Commission's ordering of directed service," and because "the Commission's ordering of such service confers certain substantial benefits * * * which in most cases are sufficient to discharge any obligation to pay such compensation or rent" (Pet. App. 59a). Since no rent is required to be paid in those circumstances, the Commission concluded that such rental payments would not qualify as costs within the statutory definition—that is "expenditures made or incurred in or attributable to the operations as directed." Section 1(16)(b)(E), 49 U.S.C. (Supp. V) 1(16)(b)(E).

2. In January 1975, prior to the promulgation of the Commission's cost reimbursement regulations, petitioner, a Pennsylvania rail carrier, acting in response to financial losses in connection with its own rail operations, issued an embargo with respect to all traffic over its lines. To avoid a disruption of essential service, the Commission,

pursuant to Section 1(16)(b) of the Act, issued emergency service orders (Pet. App. 104a-123a) directing two other rail carriers—Lehigh Valley Railroad Company and the Reading Company—to provide service over petitioner's lines for 60 days. The orders were subsequently extended for an additional period of 180 days. Petitioner unsuccessfully sought to obtain rent from Lehigh Valley and Reading for the use of its lines and facilities during the life of the service orders (see Pet. App. 9a).

Petitioner did not seek review of the service orders themselves, and it here concedes their validity (Pet. 7). Instead, petitioner filed in the court of appeals a petition to review the Commission's cost reimbursement regulations, contending, *inter alia*, that the Commission's refusal to provide for the reimbursement of a directed carrier's rental payments to a defaulting carrier for use of its lines and facilities amounts to authorizing an unlawful taking of the defaulting carrier's private property without just compensation.[2]

The court of appeals upheld the validity of the Commission's regulations (Pet. App. 1a-25a). It was "satisfied from a review of the obligations imposed on a railroad to continue service until receiving Commission approval to abandon, even when continuation results in not unreasonable losses, and from an examination of the effects on the other carrier of directed operations that directed service, when unprofitable and as currently implemented by the ICC, does not constitute a taking for

[2]Petitioner states that it filed a petition to review the Commission's cost reimbursement regulations, rather than a complaint seeking an award of just compensation for the alleged taking involved in Lehigh Valley's and Reading's use of its lines, because it was "concerned that it might be barred by the collateral attack doctrine from challenging the cost form regulations in a Court of Claims proceeding for compensation" (Pet. 7).

which compensation in the form of rental to the other carrier for the use of its lines must be provided" (Pet. App. 19a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioner's arguments reduce to one—that the Commission's regulations, insofar as they deny reimbursement to a directed carrier for rental payments made for the use of another carrier's lines and facilities, invalidly sanction a taking of the other carrier's private property for a public use without just compensation, in violation of the Fifth Amendment. Petitioner accordingly insists on a right to continued income from its rail properties even though (a) it ceased its own rail operation on those properties contrary to its public service obligations, and (b) by its cessation of service petitioner has avoided continued loss operations. The court of appeals, in an opinion on which we rely, correctly rejected petitioner's contentions.

1. The court of appeals correctly held that directing one carrier temporarily to operate on the lines of another carrier unwilling or unable to continue service does not constitute a taking of private property for public use. That holding was based on the well-established principles that the Commission "has the power to order a carrier that has not obtained a certificate of abandonment under 49 U.S.C. 1(18) to continue to provide service for as much as 240 days, the maximum period of directed service, despite a cash deficiency or operating losses" (Pet. App. 20a) and that

> a railroad or its estate may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and private interests can

be devised—that is the exercise of the rights and remedies of the owners of the carrier or its estate may be postponed for a reasonable length of time without effecting a taking [Pet. App. 21a-22a].

See *New Haven Inclusion Cases*, 399 U.S. 392, 493; *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 (Regional Rail Reorganization Act Special Court).[3]

Since a carrier may itself be required to continue operations for a reasonable time, even at a loss to itself, without effecting a taking, it follows, as the court of appeals held, that there is no taking within the meaning of the Fifth Amendment when the Commission directs another carrier to provide the service and thereby *saves* the defaulting carrier the losses which it could be constitutionally required to incur in maintaining service. As the court of appeals stated (Pet. App. 24a):

> Although as a conceptual matter, ordering a carrier to continue operations for 240 days may differ from placing another carrier on those lines for 240 days, we do not think this possible difference dictates a holding here that the latter constitutes a taking but the former does not. It might be anomalous indeed if the ICC could order forced deficit operations by a

[3]Thus in the *New Haven Inclusion Cases*, this Court held that the New Haven's statutory obligation to continue operations during the seven years required for the reorganization proceeding, at a loss of millions of dollars, did not constitute a taking for which compensation was constitutionally required. 399 U.S. 392, 490-493. As the Court explained, the obligation of the owners of a railroad to continue service, even at a loss, for a reasonable period of time is justified by the fact that "by their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Id.* at 492 (quoting from *Reconstruction Finance Corp.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 536).

> railroad and not effect a taking, but could not order another carrier to discharge those same duties, thereby in the usual case saving that railroad operating costs, without such action constituting a taking. The ICC does not take title to the other carrier's property during directed service. The other carrier's rights to sell or dispose of its property for non-railroad use are no more qualified during directed service than they are normally since prior ICC approval is required in either case.[4]

[4]The doctrine of *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, and other cases on which petitioner relies (Pet. 14-15) does not apply to petitioner's circumstances and does not invalidate the cost reimbursement regulations which it challenges. While a railroad may not constitutionally be required permanently to maintain loss operations which have no foreseeable prospect of anything but loss, petitioner has made no showing that its operations had no foreseeable prospect of profit. Petitioner has not filed for reorganization or liquidation; its threatened cessation of operations was based on what it claimed to be a recent downturn in traffic rather than a chronic condition (Pet. App. 8a); and it did not even apply for authority to abandon operations until one week before the expiration of directed service (Pet. App. 9a-10a). There is therefore no basis for a contention (Pet. 15) that it had a constitutional right under the *Brooks-Scanlon* doctrine to abandon operations. That doctrine is also inapplicable because the directed operations did not require petitioner to suffer any loss in maintaining the service over its lines.

In any event, as this Court recognized in the *New Haven Inclusion Cases*, *supra*, the *Brooks-Scanlon* doctrine is subject to the qualification that a carrier can be required to maintain loss operations for a period reasonably necessary to complete reorganization or liquidation proceedings, or to implement other solutions designed to protect the public interest in rail service. The rule is also subject to the qualification that before it may abandon service the carrier must exhaust "all reasonable efforts" to maintain service short of impairing its ability to conduct an orderly liquidation. *In re Penn Central Transportation Co.*, *supra*, 384 F. Supp. at 919, n. 31; *Myers* v. *Jay Street Connecting Railroad*, 259 F. 2d 532, 536 (C.A. 2). Petitioner has made no showing that the limited

2. Even if directed service were deemed to constitute a taking, petitioner has suffered no resulting loss for which compensation is required. In fact, petitioner benefited substantially from the directed service. As the court of appeals stated, "the other carrier during a directed operation sustains no operating losses because the directed carrier transports the other carrier's traffic for it" (Pet. App. 23a). On the contrary, the more likely result of directed service—and the result that the court found to be true in petitioner's case—is that the other carrier will be "spared losses it might otherwise have been legally required to incur" (Pet. App. 23a). Furthermore, "the other carrier's properties are maintained and in some cases upgraded during the directed operation" (*ibid.*). Directed service also maintains existing relationships with shippers to the obvious benefit of a defaulting carrier. Consequently, "rather than suffering a diminution of their collateral, the most that the owners of a carrier suffer as a result of directed service is a postponement of their remedy of abandonment, for which no compensation is necessary" (*ibid.*).

Finally, as the Commission observed in its report, since the carrier itself can foreclose directed service by choosing "to continue operating or, * * * with appropriate authorization, * * * [to] convert its properties to another use" (Pet. App. 59a), it is fair to conclude that any economic loss to the carrier results not from the Commission's ordering of directed service but from the carrier's own default on its obligation to provide service (*ibid.*).

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period of directed service exceeded that which was reasonably necessary to protect the public interest or that it took all reasonable steps to maintain service. Petitioner has not even taken the first step usually incumbent on a financially distressed carrier, which is filing for reorganization.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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